

No. 1-13-0333

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

ENGELBERT ZAVALA,)	Appeal from the Circuit
)	Court of Cook County
Petitioner-Appellant,)	
)	
v.)	No. 11 CH 41181
)	
ILLINOIS COURT OF CLAIMS,)	Honorable
)	Kathleen G. Kennedy,
Respondent-Appellee.)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Gordon and Justice Taylor concurred in the judgment.

ORDER

¶ 1 Held: Circuit court's decision dismissing petitioner's petition for writ of *certiorari* for review of a decision by respondent Illinois Court of Claims is affirmed over petitioner's contentions that a material issue of fact exists concerning the documents offered in support of respondent's motion to dismiss and the motion to dismiss was untimely filed.

¶ 2 Petitioner Englebert Zavala filed a petition for a writ of *certiorari* in the circuit court of Cook County seeking review of a decision of respondent the Illinois Court of Claims. The circuit court dismissed the petition pursuant to section 2-619 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619 (West 2012)) and Zavala appeals. On

appeal, Zavala contends that the circuit court erred in granting the motion to dismiss because (1) a material issue of fact exists concerning the documents offered in support of the motion and (2) the motion to dismiss was untimely filed. We affirm.

¶ 3

BACKGROUND

¶ 4 In 2002, Zavala was a third year medical student at the University of Illinois College of Medicine (the university). In June 2002, Zavala was dismissed from the university after his third failure to pass a written examination required as part of the university curriculum. In July 2002, he filed an administrative proceeding, known as a grievance, with the university regarding his dismissal. In an August 20, 2002, letter, university Vice Dean Michael Bailie responded to Zavala's grievance and granted him a "fourth and final opportunity" to "take and pass" the examination subject to certain conditions. Dean Bailie informed Zavala that this final opportunity was subject to assorted conditions, including Zavala's meeting with Associate Dean William Hammett for review and approval of his study plan, monthly meetings with Dean Hammett to review his progress in meeting the plan goals and written confirmation from Zavala's psychiatrist that he was capable of taking the examination. Zavala was granted four months from receipt of the letter in which to sit for the examination and, if he failed to pass the examination on this "fourth and final attempt," he would not be readmitted to the university. Zavala initially agreed to the conditions and met with Dean Hammett. However, in an e-mail dated October 7, 2002, he notified Dean Bailie that he declined

to accept the university's conditions.¹

¶ 5 On October 21, 2003, Zavala requested that the university afford him another opportunity to take and pass the examination. On December 9, 2003, Dean Bailie sent Zavala a letter denying his request. Bailie stated that Zavala had rejected Bailie's decision, the conditions thereof were not subject to negotiation or renegotiation, Zavala had refused to abide by the conditions, he was regarded as dismissed by the university as a result and Bailie would not revisit the decision.

¶ 6 On November 17, 2005, Zavala again requested an another opportunity to take the examination. By a November 30, 2005, letter, Associate University Counsel Renee McCarthy informed him that the university's position had not changed and the university would not revisit his dismissal.

¶ 7 On May 2, 2008, Zavala filed a breach of contract action against the university and its board of trustees in the Court of Claims.² He alleged that the university breached his August 20, 2002, letter agreement with Dean Bailie and sought \$500,000 in damages.

¹ In his amended Court of Claims complaint, Zavala claimed that he sent the email because Dean Hammett had imposed additional conditions that were unacceptable to Zavala.

² The Court of Claims has the exclusive jurisdiction to hear and determine all monetary claims against the State. *Reichert v. Court of Claims of the State of Illinois*, 389 Ill. App. 3d 999, 1002 (2009). It is not a "court" within the meaning of the judicial article of the Illinois Constitution but rather a fact-finding body established by the General Assembly to resolve claims against the State. *Reichert*, 389 Ill. App. 3d at 1002; *Rossetti Contracting Co., Inc. v. Court of Claims*, 109 Ill. 2d 72, 78 (1985).

¶ 8 In January 2009, the Court of Claims dismissed the action, holding that Zavala failed to file his complaint within the applicable five-year statute of limitations for breach of contract claims (705 ILCS 505/22(a) (West 2008)). The Court of Claims determined that Zavala's cause of action accrued on his receipt of Dean Bailie's August 20, 2002, letter and rejected Zavala's argument that his claim could only be filed after he exhausted all other administrative remedies, holding that the university's "subsequent responses did not re-initiate the running of the statute of limitations in regards to the alleged breach of the August 20, 2002, letter."

¶ 9 In September 2010, Zavala filed an amended complaint in the Court of Claims, asserting that, in the November 30, 2005, letter, the university declared all administrative remedies exhausted and the matter formally closed. On April 14, 2011, the Court of Claims again dismissed Zavala's action as barred by the statute of limitations.

¶ 10 Two months later, on June 16, 2011, Zavala filed a petition for rehearing. The Court of Claims denied the petition on November 3, 2011. It first noted that the petition for rehearing had not complied with the requirements of the rules of the Court of Claims because the petition "was not filed within thirty days of the filing" of the April 14, 2011, order and failed "to identify the points supposedly overlooked or misapprehended by the Court." The Court of Claims then stated that Zavala "simply reargues previously raised matters. In particular, [Zavala] fails to state any just basis as to why the five (5) year statute of limitations should not apply in this case." It explained that,

"as is affirmatively established by the Amended Complaint and the attachments to the Complaint, the applicable date for the running of the Statute of Limitations was October 7, 2003. Thus, this action was filed more than five (5) years before the date the action in his case was filed. As per the Complaint, October 7, 2003 is the date upon which [Zavala] rejected the conditions set forth in the grievance award he received, thereby fixing his status as dismissed from the College.

Alternatively, as is established by Dr. Bailie's Affidavit, on November 4, 2002 [Zavala] was informed that all matters relating to his student status had been closed and that the University planned no further action. November 4, 2002 is also well previous to the five (5) years before the filing date in this case. The periodic efforts [Zavala] *** has made to revive the Statute of Limitations by writing letters of inquiry do not change either of these dates since, one way or the other, those are the dates upon which [Zavala's] cause became fixed vis-a-vis the University."³

¶ 11 In December 2011, Zavala filed a petition for a common-law writ of *certiorari* in the circuit court of Cook County seeking review of the Court of Claims' decision.⁴ He contended that the Court of Claims denied him due process of law when it made it

³ The Court of Claims incorrectly states the date on which Zavala rejected the conditions set forth in the grievance award as October 7, 2003. Zavala actually sent his rejection email on October 7, 2002, even earlier than the court noted.

⁴ A writ of *certiorari* is the proper mode for circuit court review of a decision of the Court of Claims. *Reichert v. Court of Claims of the State of Illinois*, 203 Ill. 2d 257, 261 (2003); *Rossetti*, 109 Ill. 2d at 79.

impossible for him to file a timely petition for rehearing from the April 14, 2011, dismissal of his action and then denied his June 16, 2011, petition for rehearing because it was untimely filed more than 30 days after the decision was issued. He asserted that the Court of Claims had not notified him of its April 14, 2011, decision until May 19, 2011, more than thirty days after the order was issued. Zavala asked the Court to allow the writ, order the Court of Claims to file the record of proceedings, determine whether the Court of Claims' actions denied him due process of law and reverse the Court of Claims' dismissal of his action.

¶ 12 In August 2012, the Court of Claims filed a motion to dismiss the petition under sections 2-619(a)(9) and 2-619(a)(1) of the Illinois Code of Civil Procedure (735 ILCS 5/2-619(a)(9), (a)(1) (West 2012)). It asserted that the petition should be dismissed under section 2-619(a)(9) because Zavala's cause of action for denial of due process was completely negated by the fact that the Court of Claims had timely served the April 14, 2011, order dismissing Zavala's action on Zavala's counsel on the same day that the order was issued. The Court of Claims attached to its motion a copy of its April 14, 2011, order. It also attached an April 14, 2011, letter from the deputy clerk of the Court of Claims to "Roderick Mollison," alleged to be Zavala's attorney, notifying Mollison that a copy of the dismissal order was enclosed.

¶ 13 The Court of Claims also asserted that the petition should be dismissed under section 2-619(a)(1) because the circuit court lacked jurisdiction to hear the matter. It asserted the Court of Claims did not violate Zavala's due process rights because it had

considered the merits of the petition for rehearing despite its untimely filing and Zavala was not denied his opportunity to be heard. The Court of Claims asserted that its November 3, 2011, order denying rehearing was based not only on the untimely filing of the petition but also on the fact that the statute of limitations barred the action. The Court of Claims attached a copy of its November 3, 2011, order denying Zavala's petition for rehearing.

¶ 14 Zavala responded that the motion to dismiss should be denied because it had not been timely filed, was not supported by affidavits, improperly addressed the merits of the action and did not raise any matter which would be a complete bar to the petition for writ of *certiorari*. The Court of Claims replied, claiming that it had not received a complete copy of Zavala's petition until his counsel faxed a copy of the petition to the Court of Claims' counsel on July 26, 2012, some seven months after the petition had been filed. The Court of Claims asserted that it had informed the court on July 25, 2012, that it was unaware of service and was granted leave to investigate. Upon investigation, its counsel determined that neither the Secretary of State nor the Court of Claims had received the summons or petition. The Court of Claims asserted that its counsel then telephoned Zavala's attorney, Mollison, requesting a copy of the petition. Mollison faxed a copy of the petition and exhibits to counsel on July 26, 2012, who then filed an appearance and the Court of Claims' motion to dismiss.

¶ 15 The Court of Claims also asserted that its motion to dismiss need not be supported by affidavit because the motion was supported by public documents of which

the circuit court could take judicial notice. It lastly claimed that the writ should be denied because it was clear that Zavala could not prevail on his claim for violation of due process given that the April 2011 order was timely sent to Zavala's counsel and he had a fair opportunity to be heard since the Court of Claims denied his petition for rehearing not just because it was untimely filed but also because he had filed his action beyond the applicable statute of limitations.

¶ 16 On November 30, 2012, the circuit court granted the Court of Claims' motion to dismiss.⁵ Zavala filed a timely notice on appeal on December 31, 2012.⁶

¶ 17 ANALYSIS

¶ 18 Zavala argues that the circuit court erred in granting the section 2-619 motion to dismiss his petition for writ of *certiorari* because (1) a material question of fact exists concerning the documents offered in support of the motion to dismiss, specifically concerning the April 14, 2012, letter attached to the motion to dismiss and the court's improper consideration of the letter; and (2) the motion to dismiss was untimely filed with no excuse or justification given for the delay.

¶ 19 Generally, decisions of the Court of Claims are not subject to judicial review.

Klopfert v. Court of Claims, 286 Ill. App. 3d 499, 502 (1997). However, such review may

⁵ The court's November 30, 2012, order stated that it granted the motion to dismiss "for the reasons stated on the record." There is no transcript of the hearing on the motion in the record and the court's reasoning is, therefore, unknown.

⁶ December 30, 2012, the 30th day after entry of the court's order granting the motion to dismiss, was a Sunday.

be available in the narrow circumstance where the Court of Claims acts in a manner which deprives a party of its constitutional right to due process. *Klopper*, 286 Ill. App. 3d at 502. "Requirements of due process are met by conducting an orderly proceeding in which a party receives adequate notice and an opportunity to be heard." *Reichert*, 203 Ill. 2d at 261. "Due process is not abridged where [the Court of Claims] misconstrues the law or otherwise commits an error for which its judgment should be reversed." *Reichert*, 203 Ill. 2d at 261.

¶ 20 The Court of Claims Act (705 ILCS 505/1 through 29 (West 2010)) does not provide a method of review of decisions of the Court of Claims. *Reichert*, 203 Ill. 2d at 261. Therefore, a writ of *certiorari* is the proper mode for circuit court review of a decision of the Court of Claims, providing a means "to compel the Court of Claims to afford a party an opportunity to be heard at a meaningful time and in a meaningful manner." *Klopper*, 286 Ill. App. 3d at 502-03; *Reichert*, 203 Ill. 2d at 261; *Rossetti*, 109 Ill. 2d at 79. "There is no absolute right to review by *certiorari*, and the issuance of a writ of *certiorari* is within the sound discretion of the circuit court." *Lake v. State of Illinois*, 401 Ill. App. 3d 350, 353 (2010). If the court find that the petitioner cannot prevail or is not entitled to the review he seeks, the petition should be denied. *Lake*, 401 Ill. App. 3d at 353.

¶ 21 "[C]ertiorari may not be used to review the correctness of a decision by the Court of Claims based upon the merits of the case before it," only the question of whether the petitioner was afforded his due process rights. *Reichert*, 203 Ill. 2d at 261 (citing

Klopper, 286 Ill. App. 3d at 503); *Lake*, 401 Ill. App. 3d at 353. Therefore, we consider Zavala's assertion that the Court of Claims denied him due process and the propriety of the circuit court's dismissal of his petition pursuant to section 2-619. *Klopper*, 286 Ill. App. 3d at 503.

¶ 22 A section 2-619 motion to dismiss admits the legal sufficiency of the complaint and raises defects or defenses which defeat a claim. *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 383 (2004); *Neppl v. Murphy*, 316 Ill. App. 3d 581, 584 (2000); 735 ILCS 5/2-619(a) (West 2002). Enumerated grounds for a section 2-619 dismissal include the court's lack of subject matter jurisdiction over the action (735 ILCS 5/2-619(a)(1) (West 2012)) and that the claim asserted "is barred by other affirmative matter avoiding the legal effect of or defeating the claim" (735 ILCS 5/2-619(a)(9) (West 2012)). Interpreting all pleadings and supporting documents in the light most favorable to the nonmoving party, the defect, defense or affirmative matter must be apparent on the face of the pleading attacked or be supported by affidavit. *Borowiec*, 209 Ill. 2d at 383. We review *de novo* a court's grant of a section 2-619 motion to dismiss. *Borowiec*, 209 Ill. 2d at 383.

¶ 23 (1) Improper Consideration of April 14, 2011, Letter

¶ 24 In Zavala's petition for writ of *certiorari*, he asserted that the Court of Claims denied him due process when it delayed in transmitting its April 14, 2011, order dismissing his case until May 19, 2011. He asserted the delay made it impossible for him to file his petition for rehearing within the 30-day period provided by the Court of

Claims' rules and, as a result, the Court of Claims denied his petition for rehearing as untimely. This was Zavala's only argument in support of his claim that the Court of Claims denied him due process.

¶ 25 The Court of Claims responded with a motion to dismiss, asserting that it had not denied Zavala due process because it had mailed the April 14, 2011, order to Zavala's counsel the same day that it was entered. It attached to its motion a copy of the unsigned letter dated April 14, 2011, from the Court of Claims to attorney Mollison stating that a copy of the order was enclosed. Zavala replied, arguing that the April 14, 2011, letter was insufficient to support the motion to dismiss because it was unsworn, unsigned, not supported by affidavit, among other deficiencies.⁷

¶ 26 He makes the same argument on appeal, challenging the validity of the letter and contending that the circuit court should not have taken judicial notice of it as it did not comply with the requirements of section 2-619.⁸ However, as the Court of Claims points out, the validity of the April 14, 2011, letter as an attachment to the motion to dismiss is irrelevant because the Court of Claims' November 3, 2011, order, which was also attached to the motion and unchallenged by Zavala, provides a sufficient basis, standing alone, to grant the Court of Claims' motion to dismiss.

⁷ Pursuant to section 2-619(a), unless the grounds for dismissal appear on the face of the pleading, any affirmative matter must be supported by affidavit. 735 ILCS 5/2-619(a) (West 2012); *Borowiec*, 209 Ill. 2d at 383.

⁸ Zavala does not challenge the court's consideration of any of the other documents attached to the motion to dismiss, only its consideration of the April 14, 2011, letter.

¶ 27 The Court of Claims' November 3, 2011, order denying Zavala's petition for rehearing shows that the Court denied the petition for three reasons. The Court of Claims first addressed the fact that the petition for rehearing "was not filed within 30 days of the filing of the opinion or order" as required by its rules. However, it did not end its analysis there. Instead, it next found that the petition failed "to identify the points supposedly overlooked or misapprehended by the court," another requirement in its rules. The Court then went further, lastly addressing the merits of the petition for rehearing.

¶ 28 The Court of Claims stated that Zavala "simply reargues previously raised matters. In part, [he] fails to state any just basis as to why the five year statute of limitations would not apply to this case." It explained that "the applicable date commencing the running of the Statute of Limitations was October 7, 200[2], *** the date on which [Zavala] rejected the conditions set forth in the grievance award he received, thereby fixing his status as dismissed from the university" and that Zavala's claim was filed more than five years after that date. It also noted, in the alternative, that Dean Bailie's November 4, 2002, letter informing Zavala that all matters relating to his student loans had been closed was "also well previous to the five (5) years before the filing date in this case" and Zavala's "periodic efforts *** to revive the State of Limitations by writing letters of inquiry" did not change either of the dates "since, one way or another, those are the dates upon which [his] cause of action became fixed vis-

a-vis the university."⁹

¶ 29 The Court of Claims' November 3, 2011, order shows the court considered the merits of Zavala's petition for rehearing and denied it on that basis rather than solely because the petition was untimely filed. The order shows the Court of Claims did not cursorily examine the merits of his petition but rather considered the merits in detail, thus affording Zavala the requisite due process "opportunity to be heard at a meaningful time and in a meaningful manner." See *Klopper*, 286 Ill. App. 3d at 502-03. Given that the Court of Claims considered and decided the merits of Zavala's petition for rehearing notwithstanding the untimely filing, Zavala was not denied his due process rights by any delay in serving him notice of the Court of Claims' April 2011, order.

¶ 30 To support its assertion that it had not denied Zavala due process, the Court of Claims had attached a copy of the November 3, 2011, order denying Zavala's petition for rehearing to its motion to dismiss. Beyond asserting that the court should have ordered the Court of Claims to file a complete record of its proceedings for the circuit court's review, Zavala does not challenge the circuit court's consideration of the November 3, 2011, order. Nevertheless, we note that circuit court could properly consider the order on the motion to dismiss.

¶ 31 Well-pleaded facts are taken as true in a section 2-619 motion to dismiss. *Village of Riverwoods v. BG Ltd. Partnership*, 276 Ill. App. 3d 720, 724 (1995).

⁹ In its original January 2009 order dismissing Zavala's action, the Court of Claims had found his cause of action accrued upon his receipt of Dean Bailie's August 20, 2002, letter.

"However, a party may present evidence to satisfy its initial burden of going forward with a defense under section 2–619 [citation], notwithstanding any contrary assertions in the plaintiff's pleading." *Village of Riverwoods*, 276 Ill. App. 3d at 724. Here, the Court of Claims submitted a copy of its November 3, 2011, order to establish its section 2-619 defense that it had not denied Zavala his right to due process.

¶ 32 A court may take judicial notice of facts when addressing a section 2–619 motion. *Village of Riverwoods*, 276 Ill. App. 3d at 724. "Judicial notice is proper where the document in question is part of the public record and where such notice will aid in the efficient disposition of a case." *Village of Riverwoods*, 276 Ill. App. 3d at 724.

"[P]ublic documents which are included in the records of other courts and administrative tribunals" can be the subject of judicial notice. *May Department Stores Co. V. Teamsters Union Local No. 743*, 64 Ill. 2d 153, 159 (1976). "Such documents fall within the category of readily verifiable facts which are capable of 'instant and unquestionable demonstration ' " *May Department Stores Co.*, 64 Ill. 2d at 159 (quoting 9 Wigmore, Evidence sec. 2571, at 548 (3d ed. 1940)). The November 3, 2011, order issued by the Court of Claims was an official decision of the Court of Claims, a readily verifiable public record capable of instant and unquestionable demonstration, and the circuit court could properly consider the order.

¶ 33 The November 3, 2011, order allowed the Court of Claims to establish the evidentiary fact that it had considered the merits of Zavala's petition for rehearing notwithstanding the untimely filing of the petition, supporting a finding that Zavala was

not denied due process of law despite any delay by the Court of Claims' in notifying him that his action had been dismissed. Accordingly, the circuit court did not err in dismissing Zavala's petition for writ of *certiorari*, the sole basis for which was Zavala's argument that he was denied due process by that delay.

¶ 34 (2) Timeliness of the Motion to Dismiss

¶ 35 Zavala next contends that the court erred in granting the Court of Claims' motion to dismiss because it was untimely filed without excuse or justification. Zavala alleges that he served his petition for writ of *certiorari* on the Court of Claims on December 7, 2011, but the Court of Claims did not file its motion to dismiss the petition until more than eight months later with "no excuse or reason offered for the delay". The Court of Claims responds, as it did below, that it did not receive a copy of the petition until July 2012, and filed its motion to dismiss in a timely manner on August 14, 2012.

¶ 36 Pursuant to section 2-619(a), a motion to dismiss must be brought "within the time for pleading." 735 ILCS 5/2-619(a) (West 2012); *People v. Cortez*, 338 Ill. App. 3d 122, 128 (2003). However, even assuming *arguendo* that the Court of Claims' motion to dismiss was not filed within the time for pleading, the trial court had discretion to allow its tardy filing. *Cortez*, 338 Ill. App. 3d at 128; *In re M.K.*, 284 Ill. App. 3d 449, 455 (1996). " 'Unless it can be demonstrated that the opposing party was prejudiced by the late filing of the motion to dismiss, the trial court does not abuse its discretion by allowing tardy pleadings.' " *Cortez*, 338 Ill. App. 3d at 128 (quoting *In re Custody of McCarthy*, 157 Ill. App. 3d 377, 380-81 (1987)).

¶ 37 First, contrary to Zavala's argument, the Court of Claims did provide an excuse for its delay in filing the motion to dismiss. It informed the circuit court that its delay in filing was due to the fact that it had not received a copy of Zavala's petition for writ of *certiorari* until eight months after he filed it, and then only received a copy after having had to request it directly from Zavala's counsel. Given that the circuit court considered the Court of Claims "untimely" motion to dismiss, it necessarily must have found the excuse credible. The record does not show otherwise. Second, Zavala does not argue that he suffered any prejudice from the delay in filing the motion to dismiss. Accordingly, Zavala having failed to argue, let alone show, prejudice from the Court of Claims' delay in filing the motion to dismiss, the circuit court did not abuse its discretion in considering the motion.

¶ 38 CONCLUSION

¶ 39 For the reasons stated above, we affirm the decision of the circuit court granting the Court of Claims section 2-619 motion to dismiss Zavala's petition for writ of *certiorari*.

¶ 40 Affirmed.